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SUBJECT: UKRAINE: POLITICAL COMPROMISE SOUGHT AS COURT
HEARINGS DRAG ON

Classified By: Ambassador for reasons 1.4(a,b,d).

¶1. (C) Summary. As President Yushchenko and Prime Minister Yanukovych appeared to inch closer to a political compromise, proceedings in the Constitutional Court (CC) April 20-23 indicated that the hearings will probably continue right up to the May 1 holiday. Following a lengthy closed-door April 20 meeting with Yanukovych, Yushchenko told the press that he was prepared to suspend his April 2 decree disbanding the Rada, provided that the Rada adopted several key laws and amended others. However, he did not rule out early elections taking place at some point in the future. Yanukovych's comments on April 20 also indicated that he also sought a compromise, although he was more vague on the terms of a deal. The two leaders met again early on April 23 and were set for a second, later meeting; no public details have emerged. The Court heard final discussion of implied presidential powers from Yushchenko's representatives April 20 before turning to representatives of the Speaker and the Rada to make counter arguments, centered on Yushchenko having overstepped constitutional bounds on his powers and the Rada coalition having done nothing wrong in accepting individual MPs into the majority. Competing rallies April 20 on the Maidan and European Square were peaceful for the most part, although there was an attempt by coalition supporters to disrupt the opposition demonstration.

¶2. (C) Comment. Commentators continue to suggest that the optimal scenario would involve agreement in political negotiations before the Court rules. Both Yushchenko and Yanukovych have been sending hopeful public signals about a possible deal, but the devil is always in the details. Although the Court held a session on Saturday April 21 to try to keep proceedings moving, justices continue thorough examination of presenters in detailed question and answers. Once the open session oral arguments conclude, the justices will commence deliberations behind closed doors. The refusal of Rada representatives to answer questions from the five judges who held a press conference on April 10 to decry pressure on the Court drew a warning from the Court Chairman and denunciations from several justices that the proceedings were being politicized. The two sides have been drawing from two very different approaches to constitutional law, with the President's representative citing French and German theory and precedent and the Rada representative drawing on the Russian experience. End summary and comment.

Yushchenko and Yanukovych Looking for Political Resolution

¶3. (SBU) President Yushchenko and PM Yanukovych held multi-hour, closed door meetings on April 20 and 23 to try to draw closer to a political deal. Yushchenko told a press conference late April 20 that the political crisis should be resolved through compromise and said that he was prepared to suspend his decree if the compromise struck included: early

parliamentary elections at a future unspecified date; an imperative mandate-like rule to prevent mass numbers of MPs from switching factions; revision of the CabMin law and the Rada election law; a law on the opposition; adoption of the Universal into legislation; further amendment of the constitution by a commission and approved by popular referendum; and reform of law enforcement bodies, especially the Prosecutor General's Office (PGO). Yushchenko also voiced support for the resignation of the opposition MPs and stressed that the CEC, currently facing a sick-out by coalition-affiliated commissioners, needed to get back to work.

14. (SBU) Speaking before coalition supporters on the Maidan later April 20, Yanukovych called on political forces to sign a peace agreement, saying. "let's do what I and President Yushchenko agreed on today: next week, within a short time, resolve all contradictions." Yanukovych added that everybody awaited the CC decision, which is supposed to clarify everything. (Note: The press reported that the two Viktors resumed meeting the morning of April 23, and planned a second session later in the day, but no details had been released by COB. End note.)

Presidential Team Concludes Its Case

15. (SBU) Court justices finished questioning Presidential representative to the CC Shapoval late on April 20. During the mid-day break, Shapoval told the press that the CC debate should not deviate from legal into political issues and called on participants not to provoke others by asking political questions. In the afternoon session, he refused to answer two questions that he deemed political in nature. He also criticized CabMin representative Lukash and her

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colleagues for making inappropriate predictions--that the decree would be found unconstitutional--in the media about the outcome of the hearings. Two other presidential representatives then made short presentations echoing Shapoval's arguments, although with far less clarity.

Rada Speaks Next: Yushchenko Overstepped Bounds

16. (SBU) At Reporting Judge Stanik's suggestion, the Court agreed to hold a special Saturday session April 21 to keep the process moving. Rada Speaker Moroz's representative, Socialist MP Yaroslav Mendus, tried to submit a written brief without an oral presentation, but the judges insisted on questioning him. Mendus's main argument was that Yushchenko had exceeded his powers laid out in Article 102, because only the CC should interpret the extent of his powers. He then made the political argument that the decree was unconstitutional because it had led to confrontation within society, damaged Ukraine's international reputation, and hurt its economic prospects. According to Embassy staff present at the hearing, Mendus, who is not a lawyer, appeared unable to answer all of the questions, and in frustration, became confused and angry. In addition, he refused to answer questions from any of the five judges who held the April 10 press conference alleging pressure on the Court, leading Court Chair Dombrovskiy to warn other participants not to follow Mendus' example.

17. (C) The Rada's representative to the Court Selivanov followed with a stronger legal justification against the constitutionality of the decree in his 90-minute opening statement, echoing the position that the President had overreached his powers in applying Article 102 as a reason to dissolve the Rada. He cited Article 19, which says all bodies shall act within the framework of the constitution, and disputed that Yushchenko had carried out the required consultations with Rada leadership before issuing the April 2 decree. He argued that there was no proof of an unlawful act

by the Rada--MPs decided to join the majority as individuals, not a collective, and moreover, "majority" and "coalition" were two distinct entities that people were improperly using interchangeably. Under questioning, however, he contradicted himself by admitting that an MP represents the interests of the political force that sent him to the Rada.

¶8. (C) Comment: One of the key theoretical debates at the center of the Court hearings has been whether the constitution should be implemented strictly based on the text, as in the Soviet/Russian normative legal tradition in which most participants were trained, or more broadly and comprehensively, as is common in western legal practice, both those descended from the Roman tradition (French and German) or common law (UK, U.S.). In particular, Shapoval, one of the country's leading constitutional law experts and a former court justice (1996-2006) has drawn from French and German thought in explaining the rationale, a theoretical approach which appears to have bored or confused a number of the judges. In contrast, Rada representative Selivanov advocated the normative approach to law--"strict construction"--more familiar to those schooled in the Soviet legal system and drew on Russian precedent April 21, pointedly stating that it was "more appropriate" for the Ukrainian context than western examples. End comment.

Accusations of Politicization Exchanged

¶9. (SBU) Selivanov answered questions from the judges on the morning of April 23, although he, like Mendus, refused to answer the five judges who had protested pressure on the Court on April 10, saying that they had already made up their minds. Selivanov's approach elicited more agreement from a wider range of judges than Shapoval's. Judge Kampo, one of the five judges who had complained of pressure on April 10, made a statement just before lunch on April 23 that the hearing had become too political, proposing a draft decision on terminating the proceedings entirely. Dombrovskiy said that this document would be discussed at the CC's closed deliberation session that will commence once open plenary sessions end.

Opposition Rallies Supporters; Provocation Attempted

¶10. (SBU) The coalition and opposition held dueling rallies on the Maidan and nearby European Square late April 20, flipping the colors from similar March 31 rallies. Yanukovych spoke before 7500-8000 coalition supporters in the driving rain, emphasizing that a political compromise was desirable, before turning the stage over to a series of rap

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and pop performers. The subsequent opposition rally on April 20 drew roughly twice as many to European Square, a mixture of paid flag wavers and after-work later arrivals. Tymoshenko spoke for 30 minutes, followed by OU leader Kyrylenko and People's Self-Defense leader Lutsenko. Main themes included general criticism of the CabMin's recent decision to restore all of the generous "retirement" privileges give to ex-President Kuchma when he left office, as part of a wider rollback of the gains of the Orange Revolution. (Note: The Tymoshenko government had canceled these benefits when it came to power in February 2005).

¶11. (SBU) Tymoshenko did a better job of engaging the crowd than during the March 31 rally; her citation of Kuchma's restored benefits drew heartfelt cries of: "shame, shame" from the crowd. She expressed doubts that the CC could issue an objective ruling because nine judges had political loyalties to Kuchma and the ruling coalition, suggesting that the people should be the final arbiter (ie, through new elections). She also issued a warning to Yushchenko not to cut a deal that excluded new elections. Lutsenko asked the crowd to show that they "were behind the President," leading

an extended chant of "Yush-chen-ko," a staple of Orange Revolution rallies which had been absent for at least the past year, as disenchantment with Yushchenko grew.

¶12. (SBU) Towards the end of Tymoshenko's speech, small groups of youths walking from the direction of the Maidan tried to create a provocation, carrying rough-quality stenciled banners which, once unfurled in the crowd on European Square, read: "Yuliya to power--Yushchenko betrays" (which rhymes in Ukrainian). Opposition supporters reacted quickly but calmly, pulling down the banners as they were unfurled, collecting some in the center of the square and burning the rest on the edge in an impromptu bonfire surrounded by smiling police. The provocateurs, who numbered about 50 and looked to be university age, quickly melted into the crowd and departed without incident. Police immediately tightened up checks at chokepoints that had been set up between the two demonstrations to slow the passage back and forth, asking people moving freely in both directions to put away any party-related colors as they headed "across lines."

¶13. (SBU) Comment: While provocations were widely predicted in 2004 and on March 31, the attempt to stir up animosity between Yushchenko and Tymoshenko supporters is the first organized provocation we have witnessed. One Embassy observer saw a group of ten youths march with arms full of the banners; another saw a separate group "liberated" from their banners as they entered European Square, and a third watched a pair unfurl their banner in the middle of the crowd, but meekly surrender the wooden poles when a middle-aged couple wearing PORA! bandannas silently took it from their hands and tossed it over a security barrier. We estimate there were 50 identical banners confiscated in all.

¶14. (U) Visit Embassy Kyiv's classified website:
www.state.sgov.gov/p/eur/kiev.
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